

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

In re	)	
	)	
<b>OCC Acquisitions, Inc.</b>	)	Facility ID No. 67498
<b>Radio Station WSTA-FM</b>	)	BLH-890831KE
Charlotte Amalie, VI	)	BRH-951006UC
	)	BPH-960808IB

**MEMORANDUM OPINION AND ORDER**

Adopted: March 18, 2001

Released: March 28, 2002

By the Commission:

1. The Commission has before it an Application for Review filed September 28, 1999 by OCC Acquisitions, Inc. ("OCC").<sup>1</sup> OCC requests review of an August 30, 1999 Mass Media Bureau ("Bureau") decision, *Letter to Jerrold Miller, Esq.*, reference 1800B3-ALB (M.M. Bur. August 30, 1999), denying its December 30, 1998 petition for reconsideration (the "August 30, 1999 Reconsideration Decision"). OCC had sought reconsideration of a December 8, 1998 letter decision notifying it that the license for Station WSTA-FM,<sup>2</sup> Charlotte Amalie, Virgin Islands, had expired pursuant to Section 312(g) of the Communications Act of 1934, as amended,<sup>3</sup> because the station had been silent for 12 consecutive months, from May 27, 1997 to May 27, 1998.<sup>4</sup> For the reasons set forth below, the Application for Review is granted to the extent indicated and denied in all other respects.

2. **Background.** During the past six years, WSTA-FM has been off the air for extended periods. When on the air, WSTA-FM has frequently failed to meet minimum operating schedule requirements.<sup>5</sup> The station was silent from November 30, 1994 until February 5, 1997, at which time it resumed broadcast operations pursuant to Special Temporary Authorization ("STA") granted January 15, 1997.<sup>6</sup>

<sup>1</sup> GARK, LLC ("GARK") filed an opposition to the application for review on October 12, 1999, incorporating therein by reference its January 13, 1999 opposition to OCC's reconsideration petition. GARK, which does not identify or describe itself in its opposition to the application for review, indicated in its opposition to reconsideration that it intended to apply for "the channel vacated by WSTA-FM."

<sup>2</sup> WSTA-FM, previously WTBN(FM) was previously licensed to Trans Caribbean Broadcasting Company.

<sup>3</sup> Section 312(g) of the Communications Act of 1934 provides that "if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary." See *Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16,499 (1996).

<sup>4</sup> *Letter to OCC Acquisitions, Incorporated*, reference 1800B3-GDG (Audio Services Division, Mass Media Bureau, December 8, 1998) (the "December 8, 1998 Expiration Letter").

<sup>5</sup> See 47 C.F.R. § 73.1740.

<sup>6</sup> This STA authorized operation from the licensed site at a lower antenna height. OCC requested extension of the technical STA on July 8, 1997, but for reasons discussed below, the staff deferred action on this request.

On March 24, 1997, OCC notified the staff that WSTA-FM's operations since February 5, 1997 "consisted of test signals, station identification and music" and requested STA to operate at variance with the Commission's minimum operating schedule requirements, 47 C.F.R. § 73.1740(a)(1) "due to the need for further testing and adjustment." On October 21, 1997, OCC amended this STA request, seeking authority to remain silent rather than to operate with a reduced schedule.

3. The staff sent OCC an inquiry letter on May 12, 1997,<sup>7</sup> indicating that it had received information that WSTA-FM was silent.<sup>8</sup> The staff requested that OCC clarify the station's operating status and cautioned that failure to timely respond would jeopardize its license and call letters. OCC responded on May 15, 1997, again describing WSTA-FM's operations since February 5, 1997 as consisting of "test signals, station identification and music" and stating that WSTA-FM has not "recommenced broadcasting on a minimum operating schedule. . . ."

4. On September 22, 1997, the staff sent another inquiry letter, requesting further clarifications of WSTA-FM's broadcast schedule.<sup>9</sup> It advised OCC that its May 15 response revealed operations not in accord with § 73.1740. The staff also informed OCC that its May 15 response did not, as requested, disclose WSTA-FM's operating schedule or whether WSTA-FM had suspended operations entirely. OCC responded on October 21, 1997, providing copies of the WSTA-FM transmitter logs which demonstrated sporadic on-air operations between February 5 and May 27, 1997. OCC did not directly address the staff's specific inquiry regarding its operations after May 27, 1997, although it claimed that it was "working diligently to return the station to a full operating schedule," but that financial difficulties "have thus far prevented it from doing so."

5. Subsequently, OCC claimed that it had "identified the necessary funds to relocate the station's antenna within the licensed site" and, in a January 30, 1998 letter,<sup>10</sup> requested another STA to operate WSTA-FM from its authorized site and with its authorized power but at an antenna height 33.3 meters lower than authorized. The staff deferred action on this STA request pending an amendment demonstrating that such funding would permit resumption of operation in compliance with the minimum operating schedule requirements. In a third inquiry letter dated March 17, 1998,<sup>11</sup> the staff referenced its previous May 12, 1997 and September 22, 1997 inquiries and noted that OCC's prior responses did not clearly describe WSTA-FM's operational status since May 27, 1997. The staff once again requested that OCC clarify these matters and advised OCC that failure to timely respond "will result in actions jeopardizing both the station's license and call letters." March 17, 1998 letter at 2.

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<sup>7</sup> *Letter to David D. Burns, Esq.*, reference 1800B3-GDG (Audio Services Division, Mass Media Bureau, May 12, 1997).

<sup>8</sup> In a March 14, 1997 letter, the licensee of Station WVG(FM), Charlotte Amalie, indicated that WSTA-FM was not currently operating and that its previous operation adversely affected WVG(FM)'s radiation pattern.

<sup>9</sup> *Letter to OCC Acquisitions, Incorporated*, reference 1800B3-GDG (Audio Services Division, Mass Media Bureau, September 22, 1997).

<sup>10</sup> This letter request, although dated January 30, was not received until February 27, 1998.

<sup>11</sup> *Letter to OCC Acquisitions, Incorporated*, reference 1800B3-GDG (Audio Services Division, Mass Media Bureau, March 17, 1998).

6. Thereafter, by letter dated September 17, 1998,<sup>12</sup> the staff specifically advised OCC that Commission records indicated that WSTA-FM had been silent since May 27, 1997. The staff noted the mandate of Section 312(g) of the Communications Act that if a station is silent for any consecutive 12-month period its license expires at the end of such a period, regardless of any provision in the authorization to the contrary. The staff advised OCC that inasmuch as the Commission's records reveal that WSTA-FM had been silent since May 27, 1997, its license expired as a matter of law on May 27, 1998. Further, the staff cautioned OCC that, unless it documented within 30 days that WSTA-FM had in fact resumed operations between May 27, 1997 and May 27, 1998, the Commission's databases would be modified to indicate expiration of its license, citing *Implementation of Section 403(l) of the Telecommunications Act of 1996*, 11 FCC Rcd 16,599 (1996) ("*Silent Station Authorizations*"); 47 U.S.C. § 312(g), and 47 C.F.R. § 73.1740(c). The staff also indicated that, because OCC had failed to offer evidence that it was capable of implementing STA pursuant to the minimum operating schedule requirements, the staff had deferred processing of the July 8, 1997 and January 30, 1998 STA requests. OCC did not respond to this letter, and the staff notified OCC of the automatic expiration of its license, deleted its call letters, and dismissed the three pending STA requests as well as pending license renewal and modification applications (File Nos. BRH-951006UC and BPH-960808IB, respectively) in the December 8, 1998 Expiration Letter.

7. The August 30, 1999 Reconsideration Decision rejected OCC's contention that the staff's failure to act on its STA request prevented WSTA-FM from returning to the air. It noted that OCC failed to provide information documenting resumption of WSTA-FM operations and determined that the December 8, 1998 action notifying OCC of deletion of the WSTA-FM license and call letters was proper. The staff also indicated that OCC improperly raised for the first time on reconsideration the argument disputing the Commission's interpretation of Section 312(g) as mandating the cancellation of the WSTA-FM license and that it failed to demonstrate why this argument warranted reconsideration pursuant to 47 C.F.R. § 1.106(c).

8. **Discussion.** In its application for review, OCC first reiterates its position that cancellation of the WSTA-FM license for failure to broadcast for 12 consecutive months is not statutorily mandated and that it is entitled to demonstrate that renewal of WSTA-FM's license is in the public interest.<sup>13</sup> According to OCC, the staff's reliance on Section 312(g) without recognizing the "peculiar circumstances" here goes beyond Congressional intent. OCC also argues that inasmuch as Section 1.106(c) does not apply to legal arguments, as opposed to facts which could have been presented previously, the staff erred in failing to address its Section 312(g) argument.

9. We agree with OCC that its legal argument concerning Section 312(g) was appropriately raised on reconsideration, and we will grant review to permit consideration of that argument here. However, contrary to OCC's stated position, we find that Section 312(g) accords us no discretion and mandates that a station license will automatically expire as a matter of law if it does not "transmit broadcast signals"<sup>14</sup> for 12 consecutive months. 47 U.S.C. § 312(g); 47 C.F.R. § 73.1740(a)(1); *Silent Station Authorizations, supra*, 11 FCC Rcd at 16,600. OCC's interpretation is not supported by the plain meaning of the 1996 statute, which provides for license expiration "notwithstanding any provision, term,

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<sup>12</sup> *Letter to OCC Acquisitions, Incorporated*, reference 1800B3-GDG (Audio Services Division, Mass Media Bureau, September 17, 1998).

<sup>13</sup> OCC incorporates by reference its petition for reconsideration.

<sup>14</sup> See 47 U.S.C. § 153(6) ("The term 'broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.").

or condition of the license to the contrary.” *Compare Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 4316, 4322-23 (1994) [plain meaning of final version properly interpreted as indicative of Congressional intent]. Further, we believe the final version of Section 312(g) indicates that Congress’ intent was to provide the Commission with the most expeditious solution to the problem – amply illustrated here -- of broadcast stations remaining silent for extended periods of time to the detriment of the public interest. Thus, the statutory language allows for no Commission discretion. *See Silent Station Authorizations*, 11 FCC Rcd at 16,600.

10. Additionally, OCC concedes that it has not attempted to show – either in its responses to several inquiry letters or in its application for review -- that WSTA-FM transmitted broadcast signals at any time during the twelve-month period here at issue. Rather, it attributes its inability to resume broadcasting to staff inaction in response to its July 8, 1997 request for extension of STA and its January 30, 1998 STA request. According to OCC, this inaction is contrary to Commission policy of expediting procedures to assist silent station return to the air, citing *Public Notice, Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcasting Stations*, 11 FCC Rcd 14,356 (M.M. Bur./I. Bur. 1996) (the “Silent Station Public Notice”). The Silent Station Public Notice established procedures for expediting applications filed by silent stations and indicated that the staff would “use its best efforts” to act on applications promptly. However, it very clearly indicated that “[t]he responsibility for bringing a station back on the air is that of the licensee” and cautioned silent station applicants to use “extreme care” in preparing applications to ensure prompt action.<sup>15</sup> *Id.* at ¶ 3. It further indicated that the 1996 Telecommunications Act does not afford the Commission any discretion to extend license terms and that, “as a matter of law, staff inability to act on any application within a specified time can not prevent license expiration nor give rise to any equitable claim that a license should be extended.” *Id.*

11. In any event, we do not agree that the staff was responsible for OCC’s failure to resume WSTA-FM broadcast operations. The staff properly deferred action on OCC’s patently incomplete STA requests and unresponsive supplemental filings. The staff wrote to OCC on three separate occasions in May, 1997, September, 1997, and March, 1998 to clarify the station’s operational status. It specifically required OCC to respond three times and warned that OCC’s failure to respond would jeopardize the WSTA license. In these circumstances, the staff cannot be faulted for OCC’s neglect in failing to file an appropriate amendment. In fact, the staff acted prudently in affording OCC abundant opportunity to supply information bearing on the merits of its STA requests and its ability to return the station to normal broadcast operations. Finally, we note that OCC had the option at any point of taking steps to resume licensed operations or of amending a pending modification application to specify a lower antenna height at its then-licensed site. However, it did not pursue either of these alternatives in 1997 or 1998, despite the fact that the station had been mostly silent since November of 1994.

12. Accordingly, in light of the above, IT IS ORDERED, that the Application for Review filed on September 28, 1999 by OCC Acquisitions, Inc. IS GRANTED TO THE EXTENT INDICATED AND IS DENIED IN ALL OTHER RESPECTS.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

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<sup>15</sup> We note, moreover, that in *Silent Station Authorizations* we stated that “special temporary authorizations to remain silent . . . will not toll or extend” any 12-month period commencing on or before February 8, 1996. 11 FCC Rcd at 16,601. *See also Bluestone Broadcasters, Inc.*, 11 FCC Rcd 17,833, 17,839, n. 5 (ALJ 1996).